

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
WKLC, Inc.)	Facility ID No. 73175
)	NAL/Acct. No. MB2011941410016
For Modification of License for)	FRN: 0002012003
Station WKLC(FM), St. Albans,)	File Nos. BLMH-20110523AEG, BLH-
West Virginia)	20111003AGO, BRH-20110531ART

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2013

Released: March 5, 2013

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (“Bureau”) has before it an October 1, 2012, petition for reconsideration (“Petition”) filed on behalf of WKLC, Inc. (“WKLC”), licensee for Station WKLC-FM, St. Albans, West Virginia (“Station”). The Petition requests cancellation or reduction of a monetary forfeiture in the amount of seven thousand dollars (\$7,000) for violating Section 73.3598 of the Commission’s Rules (“Rules”) and Section 301 of the Communications Act of 1934, as amended (“Act”).¹ The Bureau also has before it the application for a covering license for the Station (“October 2011 License Application”) and the application for renewal of the Station’s license (“Renewal Application”). For the reasons stated below, the Bureau grants the Petition, grants the October 2011 License Application, and grants the Renewal Application.

II. BACKGROUND

2. WKLC filed an application on June 2, 2004 (“2004 CP Application”) seeking authorization to construct new facilities after the Station’s tower site was destroyed.² On July 19, 2004, Commission staff granted the 2004 CP Application and issued WKLC a construction permit with an expiration date of July 19, 2007. WKLC failed to file a covering license application by that date, and the permit expired by operation of law pursuant to Section 73.3598(e) of the Rules.³ On May 23, 2011, WKLC filed a license application (“May 2011 License Application”), nearly four years after its construction permit’s expiration date.⁴ On August 1, 2011, the Bureau issued a Notice of Apparent

¹ *WKLC, Inc.*, Forfeiture Order, 27 FCC Rcd 10306 (MB 2012) (“*Forfeiture Order*”).

² File No. BPH-20040602AAD.

³ 47 C.F.R. § 73.3598(e) (“Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”).

⁴ WKLC indicated that it filed the Application as a “Modification of License” rather than a covering license application because it “was unable to check the ‘purpose’ box on the Form 302-FM for ‘cover construction permit.”

Liability for Forfeiture (“NAL”) in which it found WKLC apparently liable for a forfeiture of \$3,000 for its failure to timely file a license application, and \$4,000 for unauthorized operation of the Station with the permitted facilities after the permit had expired.⁵ The Bureau also, *sua sponte*, granted WKLC Special Temporary Authority to operate the Station with the facilities specified in the 2004 CP Application so that WKLC could apply for a new construction permit for the Station specifying those facilities.⁶ WKLC filed its new construction permit application on August 16, 2011,⁷ which the staff granted on September 22, 2011. WKLC then filed the captioned October 2011 Covering License Application, and subsequently filed the timely Renewal Application, which have remained pending because of this forfeiture proceeding.

3. WKLC submitted its Response to Notice of Apparent Liability for Forfeiture (“Response”) on August 29, 2011. In the Response, Licensee argued that that the forfeiture should be reduced or cancelled because: (1) the Commission violated *Melody Music, Inc. v. FCC*⁸ by not granting a waiver of Section 73.3598(e); (2) the forfeiture is excessive in light of the circumstances; and (3) Licensee has a history of compliance with the Rules.⁹ On August 31, 2012, the Bureau issued the *Forfeiture Order*, affirming the forfeiture amount proposed in the NAL.¹⁰ In its Petition, WKLC “affirms but does not here reiterate”¹¹ its arguments from the Response. Additionally, WKLC now cites the Supreme Court’s recent decision in *FCC v. Fox Television Stations, Inc.*,¹² arguing that the Bureau cannot impose its “newly articulated” waiver policy without first providing notice of its “significant departure from past Commission practices.”¹³

III. DISCUSSION

4. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁴ Although we will not consider WKLC’s arguments that the Petition “affirms, but does not here reiterate,”¹⁵ we will address WKLC’s argument that *Fox* compels cancellation of the NAL and *Forfeiture Order*.¹⁶

CDBS apparently no longer recognizes the underlying construction permit (BPH-200040602AAD).” Application, Exhibit 1 n.1.

⁵ *WKLC, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 11001, 11005 (MB 2011) (“NAL”).

⁶ *Id.*

⁷ File No. BPH-20110816AAH (“2011 CP Application”).

⁸ *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

⁹ Response at 2-3.

¹⁰ *WKLC, Inc.*, Forfeiture Order, 27 FCC Rcd 10306 (MB 2012) (“*Forfeiture Order*”).

¹¹ Petition at 2.

¹² *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012) (“*Fox*”).

¹³ Petition at 5.

¹⁴ See 47 C.F.R. § 1.106(c), (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁵ See *WWIZ, Inc.*, 37 FCC at 686 (Commission has no duty to debate for a second time matters on which it has already deliberated and spoken).

¹⁶ *Fox* was decided on June 21, 2012, after WKLC filed its Response. Therefore, WKLC could not have previously argued that *Fox* controls our decision here, and this argument is properly raised for the time in the Petition.

5. *Fox* concerned broadcasts of three “fleeting” incidents that the Commission found to be actionably indecent.¹⁷ When the broadcasts aired, however, they would not have been considered indecent under the existing policy.¹⁸ Although the Commission did not impose a forfeiture against the stations in question, the Commission found the broadcasts to be indecent under a new policy that the Court characterized as “a 180-degree turn regarding its treatment of ‘fleeting expletives.’”¹⁹ The Court held that “a regulatory change this abrupt” “. . . ‘fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.’”²⁰ Accordingly, the Court set aside the Commission’s orders that found the broadcasts indecent.²¹

6. In the Petition, WKLC argues that the Bureau’s decision not to waive the automatic forfeiture provision of Section 73.3598(e) because the May 2011 License Application was filed almost four years late constitutes an “abrupt regulatory change” in light of the Bureau’s history of waiving that provision for “relatively minor filing deadline violations” where the applications were late-filed by a number of days or weeks.²²

7. The Bureau has the authority to issue Notices of Apparent Liability for “failure to file a required form” for violations of covering license applications filing deadlines, under Section 503(b)(1)(B) of the Act, and Section 1.80(b) of the Rules.²³ Additionally, the Bureau has the discretion to issue a higher or lower forfeiture than provided in the guidelines or to issue no forfeiture at all.²⁴ Section 1.3 of the Rules²⁵ also provides that “[t]he provisions of [Chapter 47 in the Code of Federal Regulations] may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act”²⁶ However, the Bureau is not required to waive its provisions if waiver would undermine the policy objective of the provision in question.²⁷

8. In *Clear Channel I*,²⁸ the Bureau waived Section 73.3598(e) because (1) the facility was constructed by the expiration date, and (2) the delay in filing the license application amounted to only two

¹⁷ See *Fox*, 132 S.Ct. at 2314. One broadcast aired in 2002, and the other two aired in 2003.

¹⁸ When the broadcasts aired, the Commission had previously given examples of material that was found not indecent because it was fleeting and isolated. Furthermore, the fact that an incident was “passing or fleeting” in nature tended to weigh against a finding of indecency. *Id.*

¹⁹ *Id.* at 2314-15, quoting *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2nd. Cir. 2009).

²⁰ *Id.* at 2318, quoting *United States v. Williams*, 553 U.S. 285, 304 (2008).

²¹ *Id.* at 2320.

²² Petition at 4.

²³ 47 U.S.C. § 503(b) and 47 C.F.R. § 1.80.

²⁴ 47 C.F.R. § 1.80, note to paragraph (b)(5).

²⁵ 47 C.F.R. § 1.3.

²⁶ It is within the staff’s delegated authority to act under Section 1.3. See 47 C.F.R. §§ 0.281, 0.283.

²⁷ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (finding that the Commission may decide in some instances that rule waiver serves the public interest if an applicant’s proposal will not undermine the policy served by the rule). See also *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (“*NetworkIP*”) (waiver appropriate only if both: (i) special circumstances warrant a deviation from the general rule; and (ii) such deviation will serve the public interest).

²⁸ *Clear Channel Broadcasting Licenses, Inc.*, Letter, 21 FCC Rcd 8677 (MB 2006) (“*Clear Channel I*”).

days.²⁹ Furthermore, in *Clear Channel II*,³⁰ the Commission clearly stated that “the staff may also issue Notices of Apparent Liability for ‘failure to file a required form’ as authorized by Section 503(b)(1)(B) of the [Act] and Section 1.80 of the Rules, for such violations of covering license application filing deadlines.”³¹ However, even though *Clear Channel II* was decided before the issuance of the *NAL*, that case was nonetheless decided long after the July 19, 2007, permit expiration date, which constitutes the deadline for the filing of the WKLC covering license application.³² Moreover, prior to *Clear Channel II*, the Bureau had not issued a notice of apparent liability for similar violations of Section 73.3598(e), even though it had the ability to do so. We will therefore cancel the forfeiture issued to WKLC here.

9. Additionally, *Clear Channel* and *Clear Channel II* left unresolved what constitutes “relatively minor filing deadline violations” and for how long after the expiration of a construction permit the staff will accept a covering license application. Going forward, we will only waive the automatic expiration provision of Section 73.3598(e) and accept a late-filed covering license application where: (1) the permittee demonstrates conclusively that construction in accordance with the construction permit was complete and the station was “ready for operation” by the permit expiration date; and (2) the covering license application is filed within 30 days of the expiration date.³³ This 30-day period aligns with the 30-day period for filings petitions for reconsideration.³⁴ We emphasize that this 30-day waiver will only be available to permittees that have in fact completed construction of their facilities in accordance with their construction permit.³⁵

²⁹ *Id.* at 8681.

³⁰ *Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153 (2011) (“*Clear Channel I*”).

³¹ *Id.* at 7157 ¶ 11.

³² As noted above, the staff granted the 2004 CP Application on July 19, 2004, and the construction permit expired on July 19, 2007. *Clear Channel II* was not decided until May 6, 2011.

³³ In *NetworkIP* the court stated that “before the Commission can invoke its good cause exception, it *both* must ‘must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.’” *Network IP*, 548 F.3d at 127, *citing Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). Our 30-day waiver policy satisfies this test. On the one hand, the public interest is served by granting covering licenses to permittees that have invested capital and resources to broadcast to the public with the facilities specified in the construction permit. Second, we are limiting this waiver only to the rare circumstances where permittees timely complete construction of their facilities, as authorized by their construction permits, and have merely failed to promptly file the covering license application. Moreover, we are limiting the waiver to lapses of 30 days or less to minimize the possibility of third-party reliance upon lapse of an underlying construction permit.

³⁴ 47 U.S.C. § 405(a).

³⁵ Where a permittee files a covering license application but has not completed construction of its facility in accordance with the terms of its permit, we will declare that permit expired and forfeited. *See, e.g., Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8243 (MB 2009) (“*Great Lakes*”) (permit declared forfeit when permittee filed covering license application falsely certifying that station had been constructed); *Barry A. Friedman, Esq.*, Letter, 24 FCC Rcd 8210, 8212-13 (MB 2009) (denying reconsideration of dismissal of “patently defective” license application and stating that permit had expired by operation of law due to permittee’s failure to timely construct); *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419-20 (2003) (affirming staff dismissal of patently defective license application and cancellation of underlying permit). Moreover, the permittee may be subject to additional sanctions for misrepresentation. *See, e.g., William L. Zawila*, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 18 FCC Rcd 14938 (2003) (permittee filed covering license and provided falsified construction records for unbuilt facility); *Great Lakes*, 24 FCC Rcd at 8243 (permittee’s character qualifications to be addressed in forthcoming *Hearing Designation Order* to the extent it retains any applications on file).

10. We also will continue to exercise our authority to issue Notices of Apparent Liability to permittees that operate with facilities authorized in expired construction permits, subject to this 30-day grace period following the expiration of the construction permit. We also reiterate our longstanding principle that the expiration of a construction permit does not require affirmative action by the Commission.³⁶ Thus, permittees should not expect notification from the Commission of the forthcoming expiration of their permits.

11. *Covering License.* After the dismissal of the May 2011 License Application, WKLC filed the 2011 CP Application and subsequently – and timely – filed the October 2011 License Application. We find that WKLC has satisfied Section 319(c) of the Act³⁷ by completing construction of its modified facility as authorized by its construction permit and will grant the October 2011 License Application below.

12. *License Renewal.* We have evaluated the Renewal Application pursuant to Section 309(k) of the Act, and we find that the station has served the public interest, convenience, and necessity during the subject license term, notwithstanding the isolated Section 73.3598(e) issue described above; there have been no serious violations of the Act or the Rules; and there have been no other violations which, taken together, constitute a pattern of abuse. We will therefore grant the Renewal Application below.

IV. ORDERING CLAUSES

13. Accordingly, for the reasons discussed above, IT IS ORDERED, that the Petition for Reconsideration filed on October 1, 2012, on behalf of WKLC, Inc., IS GRANTED.

14. IT IS FURTHER ORDERED, pursuant to Section 503(b)(6)(A) of the Communications Act of 1934, as amended, that the \$7,000 forfeiture issued to WKLC, Inc., on August 31, 2012, IS CANCELLED. WKLC, Inc., is instead hereby ADMONISHED for its violation of Section 73.3598 of the Commission's Rules.

15. IT IS FURTHER ORDERED that the covering license application (File No. BLH-20111003AGO) and license renewal application (File No. BRH-20110531ART) filed by WKLC, Inc., ARE GRANTED.

³⁶ 47 C.F.R. § 73.3598(e). See *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23091 (1998) (“*Streamlining R&O*”), recon. granted in part, 14 FCC Rcd 17525 (1999). See also 47 U.S.C. § 319(b). Nevertheless, we believe it is appropriate to accept and process license applications filed within 30 days of the permit expiration date, consonant with the statutory 30-day reconsideration period accorded to “aggrieved parties” under the Act.

³⁷ 47 U.S.C. § 319(c).

16. IT IS FURTHER ORDERED, that a copy of this Memorandum Opinion and Order shall be sent by Certified Mail Return Receipt Requested, to WKLC, Inc., 100 Kanawha Terrace, St. Albans, WV 25177, and to its counsel, Sally A. Buckman, Esq., Senter Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, DC 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau